the nature of the transaction that the defendant was entitled to keep any profit he made on sales to dealers. The defendant admitted that he had delayed payments for over 90 days and that to date he owed the plaintiff $20,551.99, but he stated that he defaulted payment because the plaintiff had been guilty of late deliveries. The late payments according to him were a means of protest against the late deliveries. Because of the late payments and the difficulty of collecting money from the defendant, the plaintiff delayed or stopped the order for goods; and on 9th September 1966, his appointment as agent (distributor) was revoked. In dealings of this nature where goods were supplied on consignment basis, each consignment became a distinct contract; and payment for the goods within the agreed period would be an essential term of the contract, but the question of prompt deliveries could not be a matter of implication. The question of supply depends on extraneous considerations, particularly the availability of those goods at the time of the order. In any event, no evidence has been adduced to show that the plaintiff was guilty of non-deliveries or late deliveries of goods, apart from a mere assertion of facts. Under those circumstances, the plaintiff had sufficient cause to refuse to supply further which terminated the agency (distributorship).

In *Vishnucharya v. Ramchandra*[1] the appellate court was dealing with a somewhat similar case involving the question of construction of a letter of appointment and termination of agency. In that case, the plaintiff was appointed by the defendant to collect rents from his property in perpetuity and from the rents the plaintiff could take Rupees 42 annually as his wages. Melvill J. stated:—

"As between the parties, the appointment was valid and binding, whether or not any valuable consideration passed; for the mere acceptance of the office by the plaintiff was a sufficient consideration for the appointment."

The judgment went on to deal with the question of revocation of the authority of an agent which is also relevant to this case:—

"The remedy for the improper revocation of an agency lies, under ordinary circumstances, in an action for damages for breach of contract. By section 205 of the Contract Act (similar to our section 158), the principal is bound to make compensation to the agent, whenever there is an express or implied contract that the agency shall be continued for any period of time. This would probably always be the case when a valuable consideration had been given by the agent. An action for damages might probably have been maintained in the present case, whether a valuable consideration was given by the plaintiff or not."

The valuable consideration here must be more than undertaking the agency. Even assuming that there was a contract, under what circumstances could the agency be revoked? The answer is to be found in section 158 of the Contracts (Malay States) Ordinance, 1950, which states:—

"Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, ... for any previous revocation or renunciation of the agency *without sufficient cause.*"

Since the plaintiff had sufficient cause to terminate the agency, no damages would be payable for the unexpired period of the agency.

In the circumstances, I would dismiss the counterclaim with costs.

Counterclaim dismissed.

Solicitors: *Lee Beng Cheang & Co.; Shearn Delamore & Co.*

TENGKU BESAR ZABAIDAH v. KONG CHENG WHUM*

[O.C.J. (Syed Othman J.) May 8, 1969]
[Kota Bharu — Civil Suit No. 9 of 1965]

Landlord and Tenant — Rent — Excess payment — Counterclaim for — Limitation — Standard rent under Control of Rent Ordinance, 1956 as amended by Control of Rent (Application to Kelantan) Enactment, 1964 — Expiration of Ordinance — Revival of — Effect of.

Legislation — Repealed law — Claim under — Lapse of Ordinance — Revival of — New Act repealing Ordinance.

The defendant counterclaimed for a sum of $11,455 which he alleged to have been paid in excess of the lawfully permitted maximum rent for certain premises in Kota Bharu, Kelantan, for the period from June 1, 1947 to February 28, 1965. He relied on the provisions of the Control of Rent Ordinance, 1956 and, in view of the Limitation Ordinance, 1953, limited his counterclaim to a period of 6 years from January 21, 1959. It was contended for him that the counterclaim would have to be based on section 8(3) of the Control of Rent Act, 1966: notwithstanding the fact that the provision of the 1966 Act did not exist at the time of counterclaim as the hearing of the action was after the commencement of the 1966 Act, the law at the time of the proceedings would be applicable.

The Control of Rent Ordinance, 1956 was applied to Kota Bharu till June 30, 1964 when it lapsed. From July 1964 to December 1964 Kelantan had no legislation governing control of rent. From January 1, 1965 it was revived with certain amendments by the Control of Rent (Application to Kelantan) Enactment, 1964. The Control of Rent Act, 1966 which repealed the 1956 Ordinance, came into force on January 1, 1967.

Arising from the state of the law the questions for the court to decide in this case were: (a) whether a claim for overpayment of rent lies after the expiration of a written law; (b) whether there is any right to a claim for overpayment during the period in which the general law of contract applied; and (c) the rights of the tenant after the revival of the Control of Rent Ordinance, 1956, as modified by the State Enactments.

Held, dismissing the counterclaim: (1) the rights of the defendant to a standard rent in this case were

*The Federal Court, whose judgment will be reported in due course, dismissed the defendant's appeal on November 28, 1969.

acquired under the Control of Rent Ordinance, 1956. As section 8(3) of the 1966 Act specifically related to excess of rent under the provisions of the Act, it is doubtful if this right could be extended to repealed provisions;

(2) as no action can be brought to claim any right conferred by any law after its repeal, the counterclaim in this case for the period January 21, 1959 to June 30, 1964 could not stand;

(3) under the general law of contract the rent payable by a tenant to the landlord is the rent agreed to between the parties. From the evidence the tenant agreed to pay rent for the premises at $120 a month during the period from June 30, 1964 to December 31, 1964. The question of overpayment therefore did not arise;

(4) the revival of the Control of Rent Ordinance, 1956, with amendments as supplied by the Legislature of the State of Kelantan with effect from 1st January, 1965, gave the law an entirely new complexion. Having regard to the new definition of "standard rent" it was clearly the intention of the State Legislature to divorce the effect of the new provisions from that of the provisions under the Control of Rent Ordinance, 1956, as they stood before the revival. The standard rent under the new provisions was the rent which the tenant had paid or agreed to pay to the landlord on 30th day of June, 1964, and not 25th September, 1940, as in the Control of Rent Ordinance, 1956. The agreed rent as indicated above was $120 per month. Under the new provisions this was not unlawful.

Observations on the requirement of determination of tenancy before any increase of rent.

Cases referred to:—

(1) *Che Esah & Anor.* v. *Limah* [1966] 1 M.L.J. 36.

(2) *Hutchinson* v. *Jauncey* [1950] 1 K.B. 574.

(3) *Remon* v. *City of London Real Property Company Ltd.* [1921] 1 K.B. 49.

(4) *Surtees* v. *Ellison* (1829) 9 B. & C. 750, 752.

(5) *Kay* v. *Goodwin* (1830) 6 Bing. 576.

(6) *Fenner* v. *Blake* [1900] 1 Q.B. 426, 428.

(7) *Inchiquin (Lord)* v. *Lyons* (1887) 20 L.R. Ir. 474.

CIVIL SUIT.

Tengku Ahmad Rithauddeen for the plaintiff.

H.L. Wrigglesworth for the defendant.

Cur. Adv. Vult.

Syed Othman J.: This counterclaim arose out of a claim by the plaintiff for possession of premises No. 2725, Jalan To' Hakim, Kota Bharu, Kelantan, on termination of tenancy in 1964 and double rent as from the date the tenancy was terminated. The defendant in his defence to the claim relied upon the provisions of the Control of Rent Ordinance, 1956, as applied to Kelantan by the Control of Rent (Application to Kelantan) Enactment, 1964, and made a counterclaim for the sum of $11,455 which was alleged to have been paid in excess of the lawfully permitted maximum rent for the said premises for the period 1st June, 1947, to 28th February, 1965.

The plaintiff then discontinued her claim but the defendant pursued the counterclaim limiting it to a period of 6 years prior to the action after conceding to the plaintiff's defence under the Limitation Ordinance, 1953 (No. 4 of 1953). It was agreed that the cause of action accrued on 21st January, 1965, and the counterclaim in respect of excess of rent would be limited to 6 years from 21st January, 1959.

The evidence shows that the rent of the premises in 1940 was $40 per month, from June, 1947, was $65 p.m., from January, 1953, $100 p.m. and from March 1964, $120 p.m. and that the annual value of the premises in 1940 was $480, and the assessment rate at 10%; in 1950 the annual value was $900 and the assessment rate was 12%; in 1957 the annual value was $1,200 and the assessment rate was 12%.

The plaintiff admitted that the rent was increased from time to time up to $120 p.m. She said further that the increase of rent was by mutual agreement and that there was no notice terminating the tenancy.

Learned counsel for the defendant argued that the counterclaim would have to be based on section 8(3) of the Control of Rent Act, 1966 which came into force on 1st January, 1967. According to him notwithstanding the fact that the provisions did not exist at the time of counterclaim as the hearing of the action was after the commencement of the Act, the law at the time of the proceedings would be applicable. He relied upon the case of *Che Esah & Anor, v. Limah.*[1] The facts of the case as appearing in the headnote are as follows:—

"The respondant obtained an order against the appellant for the surrender of vacant possession of certain premises and damages for unlawful occupation of the said premises. The appellants appealed on the ground that the first appellant was a widow of the deceased tenant and that she was therefore protected by the Control of Rent Ordinance, 1956. At the hearing counsel for the appellants applied to withdraw an admission made by their former counsel at the trial that the first appellant was no longer a widow, as she had remarried after the death of her former husband who was the tenant."

Barakbah C.J., as he then was, in delivering the judgment of the Federal Court at page 37 said the following:—

"The next point for consideration is whether the first appellant had left the premises and then reoccupied it in 1962 as alleged by the respondent. First appellant denied this and stated that she was in continuous occupation from the death of her husband. But assuming that she had left and then comeback would it affect the tenancy of the premises? Referring again to *Megarry* on the Rent Acts, 9th Ed. p.224 it was stated that although the landlord's claim to possession at common law must be complete when the proceedings are commenced, the circumstances relevant to his claim to possession under the Acts, both as to reason-

ableness and, in general, the specific heads, are those existing not when proceedings are commenced but at the date of the hearing by the court of trial, and not the Court of Appeal. See the cases of *Hutchinson v. Jauncey*(2) and *Remon* v. *City of London Real Property Company Ltd.*(3) In the present case, no notice was served on the legal representative of the deceased or the Chief Justice. The only notice served was on the widow, the first appellant, on 28th February 1963 and the hearing in the Sessions Court began on 27th November 1963. In my view, therefore, as the law applicable was the law as it existed at the date of the hearing, and as the tenancy was then protected by the provisions of the Control of Rent Ordinance 1956, no order for possession could be made."

In my view what in effect is intended by the judgment and the authorities cited in it is that in a claim by the landlord for possession of premises, the law to be applied is the law in force at the time of the proceedings. The principles do not appear to have any application to a claim for overpayment of rent. The right to recovery of possession of rented premises is ordinarily available to the landlord at common law. Where statutory provisions governing such recovery exist then the courts will have to apply such provisions notwithstanding the common law.

The rights of the defendant to a standard rent in this case were acquired under the Control of Rent Ordinance, 1956, and not under common law. Sub-section (3) of section 8 of the Control of Rent Act, 1966, specifically related to excess of rent under *the provisions of the Act.* I doubt very much if this right can be extended to repealed provisions.

In any case, let us assume that learned counsel for the defendant was right in his submission that sub-section (3) of section 8 of the Control of Rent Act, 1966, applied to this counterclaim. Now this sub-section provides that a tenant who has paid his landlord a sum in excess of the rent which may be lawfully received under the provisions of this Act may recover such sum from the landlord. Section 7 of the Control of Rent Act, 1966, in effect permits the determination of fair rent between the landlord and the tenant. Learned counsel cannot be heard to say that only sub-section (3) of section 8 of the Act applies but section 7 cannot apply to the case in question. There is ample evidence to show that the increase of rent was the result of agreement or determination between the parties. There is nothing to show that the payment the plaintiff received would be unlawful under the Act. Under the Act therefore there is no overpayment.

In my view it is also necessary to consider the state of the legislation covering the period of the alleged overpayment. The position of the legislation relating to control of rent in the State of Kelantan during the period was somewhat peculiar. The provisions of the Control of Rent Ordinance, 1956, after their introduction in 1956 had effect only for twelve months within the areas of all local authorities from the date appointed by the High Commissioner in the *Gazette.* The first date appointed was 1st July, 1956 (see L.N. 168/56). Thereafter their continuance was subject to an order made by the Ruler in Council who might extend them from time to time in the area of any local authority for a further period of twelve months from the time at which the provisions of the Ordinance would otherwise cease to have effect — see sub-section (3) of section 1 of the Ordinance.

The Ordinance was applied to Kota Bharu in accordance with this provisions till 30th June, 1964 when it lapsed.

In 1964 the Legislature of the State of Kelantan enacted the Control of Rent (Application to Kelantan) Enactment, 1964, which came into force on 1st day of January, 1965. The Enactment was further amended in 1965 by Enactment No. 6 of 1965 which was deemed to have come into force on the 1st day of January, 1965. By the amending Enactments "standard rent" means the rent at which the tenant had paid or had agreed to pay to the landlord on the 30th day of June, 1964, or in the case of premises which were then unlet, "standard rent" means the rent which the premises were first let after the 30th day of June, 1964.

A new section 6 of the Ordinance introduced by the Enactments reads as follows:—

"6(1) The maximum recoverable rent of any premises shall be:—

(a) Where the rent has been fixed by order of the Board, the rent so fixed:

Provided that if at any time subsequent to the making of any order fixing the rent, the rates payable by the landlord in respect of the premises have been increased, the rent may be increased above the rent so fixed to the extent of such increase, or

(b) where there has been no order of the Board fixing the rent of the premises, the Standard Rent may be increased by not more than 100% of the Standard Rent.

(2) In assessing the maximum recoverable rent, regard shall be had to the following:—

(i) The condition and type of the particular premises concerned.

(ii) The locality in which the premises concerned are situated.

(3) Nothing in this section shall be deemed to relieve a landlord from the necessity of determining the tenancy according to law prior to increasing the rent.

(4) Nothing in this section shall apply to any tenancy arising from the subletting of part of any premises."

From July, 1964, to 31st December, 1964, Kelantan had no legislation governing control of rent. Therefore during this period the general law of contract applied.

Arising from the state of the law the questions for me to determine in this case are:—

(a) whether a claim for overpayment of rent lies after the expiration of a written law;

(b) whether there is any right to a claim for overpayment during the period in which the general law of contract applied; and

(c) the rights of the tenant after the revival of the Control of Rent Ordinance, 1956, as modified by the State Enactments.

As to (a), section 15 of the Interpretation and General Clauses Ordinance, 1948, provides:-

"The expiration of a written law shall not affect any civil or criminal proceedings previously commenced under such written law, but every such proceedings may be continued and everything in relation thereto may be done in all respects as if the written law continued in force."

The implication of this provision is clear. It is that no action can be brought to claim any right conferred by any law after the repeal of that law, although it does not affect any proceedings commenced during the existence of such law.

Lord Tenterden in *Surtees* v. *Ellison*[4] said, "when an Act of Parliament is repealed it must be considered (except as to transactions past and closed) as if it never existed." In *Kay v. Goodwin*[5] Tindal C.J. explained the effect of a repeal at page 582 as follows:—

"I take the effect of repealing a statute to be to obliterate it as completely from the records of the Parliaments as if it has never been passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law."

The counterclaim in this action was filed in February, 1965. It is clear on the above principles that the counterclaim for the period 21st January, 1957 to 30th June, 1964, cannot stand as it is based upon a defunct law.

As regards (b), under the general law of contract the rent payable by a tenant to the landlord is the rent agreed to between the parties. From the evidence the tenant agreed to pay rent for the premises at $120 a month during the period from 30th June, 1964, to 31st December, 1964. The question of overpayment therefore does not arise.

As regards (c) the revival of the Control of Rent Ordinance, 1956, with amendments as supplied by the Legislature of the State of Kelantan with effect from 1st January, 1965, gave the law an entirely new complexion. Having regard to the new definition of "standard rent" in my view it was clearly the intention of the State Legislature to divorce the effect of the new provisions from that of the provisions under the Control of Rent Ordinance, 1956, as they stood before the revival. The standard rent under the new provisions was the rent which the tenant had paid or agreed to pay to the landlord on 30th day of June, 1964, and not 25th September, 1940, as in the Control of Rent Ordinance, 1956. The agreed rent as indicated above was $120 p.m. Under the new provisions this is not unlawful.

Learned counsel for the defendant has further argued that there must be termination of tenancy before any increase of rent. Subsection (3) of section 6 of Control of Rent Ordinance, 1956 as amended by the Kelantan amending Enactment No. 6 of 1965 reads that nothing in the section shall be deemed to relieve a landlord from the necessity of determining the tenancy according to law prior to increasing the rent. I do not think that this provision has any application to this case as on the 1st January, 1965, the date of the coming into force of that Enactment, there was already an agreed rent of $120 per month.

In any case assuming that it does apply, in my understanding of this provision, which purports to be merely declaratory, the requirement of determination of tenancy depends on the general law of contract, in view of the words "according to law" appearing in the provision. It cannot be read as presupposing that under the law in every case of tenancy, the landlord is required to determine such tenancy before he can increase the rent. If it has this effect, the requirement would be odd because it is restricted only to increase of rent but not to reduction or other form of variation which has a similar effect on a tenancy.

Furthermore the authorities appear to indicate that where the tenancy is one which does not require to be in writing so that it can be varied by parol, rent may be varied without the need for a surrender of the old tenancy. Variation of the terms of a contract or the manner in which they should be varied is ordinarily a matter for the parties. A term in a contract can ordinarily be varied by the parties without the necessity of determining the whole contract.

In *Foa's* General Law of Landlord and Tenant (8th Ed.) the learned author said at page 635:—

"The mere fact of payment and acceptance of a diminished rent will not amount to a surrender, where it does not of itself imply a new demise; and the same holds good of an increased rent payable upon alteration

or improvements. But in both cases such payment may be evidence of surrender and new tenancy."

In *Fenner v. Blake,*[6] Channell J. said:—

"It is by no means uncommon for a landlord and tenant to agree by parol to a variation of the terms of an existing tenancy, such as an alteration in the amount of the rent, and at all events in cases where the tenancy was such that the contract creating it was not required by law to be in writing, as in the case of a tenancy from year to year, a parol variation of the terms as to the rent would be perfectly good and sufficient in point of law."

In *Inchiquin (Lord)* v. *Lyons*[7] Morries C.J. said:—

"I am not aware of any case deciding, as an abstract proposition, that in no case can a landlord and tenant agree to raise the rent without creating a new tenancy. That would lead to extraordinary consequences. More generally there is a reduction of rent; and suppose a reduction is made to a tenant, and an arrangement that he is to hold on at the reduced rate, and that such reduced rate is to relate back to a previous period, would that create a new tenancy? I presume that if an arrangement to increase the rent would *ipso facto* create a new tenancy an agreement for a reduction would have the same effect. The consequences of that are, at all events, worthy of consideration. I am not aware that such a proposition has ever been decided, and I think it is contrary to the ordinary right that two persons are to be prevented from entering into an agreement, which is not immoral or against public policy, *viz.*, that the rent is to be increased or diminished, without putting an end to the old tenancy."

In the case here the evidence shows that the tenant himself agreed to the increase of rent during the continuance of the tenancy and there is nothing to show that as regards the tenancy in question the general law of contract requires that it should be determined before rent can be increased.

The counterclaim is dismissed with costs.

Counterclaim dismissed.

Solicitors: *Rithauddeen & Aziz; Wrigglesworth & Co.*

RE LIM LENG CHEAK, DECD.; LIM EOW THOON v. LIM KENG CHUAN & ANOR.

[F.C. (Azmi L.P., Suffian & Gill F.JJ.) June 19, 1969]

[Penang—Federal Court Civil Appeal No. X.60 of 1968]

Trust and Trustees — Trust for burial ground — Whether trust had become incapable of performance — Plea of res judicata.

This was an appeal against the judgment of Ong Hock Sim J. ([1968] 2 M.L.J. 235) dismissing the appellant's prayer for a declaration that the trust in relation to certain burial land had become impossible of performance and that there was therefore a resulting trust of the said land in favour of the appellant. In an earlier application the High Court had held that the trust still subsisted ([1965] 2 M.L.J. 154). An appeal had been lodged against that decision but a consent order had been made on terms. In this appeal it was argued: (i) as the authority had refused to give burial permits to certain parts of the land and had also indicated that it would not do so in future, the trust had become incapable of performance and therefore there was a resulting trust in favour of the appellant; (ii) the learned judge was wrong in holding that the defence of *res judicata* applied.

Held, dismissing the appeal: (1) the trust in this case had not failed as there was still a trust to maintain and keep in order the graves that were in existence and there were parts of the land as to which there was no indication that the authority would refuse to give burial permits;

(2) the learned judge was wrong in holding that *res judicata* applied, as the issue before him was different from that previously decided, in that in this case the court was asked to say that there had been a failure of the trust by reason of the fact that the authority had since the date of the prior judgment refused to allow further burials.

Case referred to:—

(1) *In re Scholfield's Will's Trusts,* and *Scholfield* v. *Scholfield & Ors.* [1949] 1 Ch. 345.

FEDERAL COURT.

C.H. Smith (*Ong Huck Lim* with him) for the appellant.

C.O. Lim for the respondent.

Cur. Adv. Vult.

Azmi L.P.: This is an appeal against the judgment of Ong Hock Sim J. at Penang, dismissing the appellant's prayer for a declaration that a certain trust in reference to a certain land had become impossible of performance and there was therefore, a resulting trust of the said land in favour of the appellant.

The said land was part of the real property of the estate of one Lim Leng Cheak deceased, which eventually by the order of the High Court in Penang, dated 21st December, 1927 was vested in his widow Madam Tan in her own right absolutely.

By an indenture dated 24th March, 1929 made between Madam Tan of the first part and the appellant on the second part, it was agreed that the estate of the said deceased should be finally wound up and for the consideration therein mentioned, Madam Tan agreed to transfer to the appellant for his own use absolutely when called upon to do so, all the landed properties of the said estate in Penang and Kedah.

The said land has been used and maintained as a burial ground for the said Lim Leng Cheak deceased, his family and descendants including lots 140(11), 43(1), 43(2), 43(3), 135, 13(1), 13(2), 13(3), 13(4), 139(2), 139(3), 143 and 144(1), all in Mukim XVIII in Penang. It was the intention of the said Madam Tan and the appellant that the said